

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 6
1201 Elm Street, Suite 500
Dallas, Texas 75270**

In the Matter of

Aktive Health, LLC,

Respondent.

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Docket No. FIFRA-06-2021-0319

CONSENT AGREEMENT AND FINAL ORDER

Preliminary Statement

The U.S. Environmental Protection Agency, Region 6 (“EPA” or “Complainant”), and Aktive Health, LLC (“Respondent”) have agreed to a settlement of this action before the filing of a complaint, and thus this action is simultaneously commenced and concluded pursuant to Rules 22.13(b) and 22.18(b)(2) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. §§ 22.13(b) and 22.18(b)(2).

Jurisdiction

1. This proceeding is an administrative action for the assessment of civil penalties instituted pursuant to Section 14 of the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”), 7 U.S.C. § 136l.

2. This Consent Agreement and Final Order serves as notice that the EPA has reason to believe that Respondent has violated Section 12 of FIFRA, 7 U.S.C. § 136j.

Parties

3. Complainant is the Director of Enforcement and Compliance Assurance Division of the EPA, Region 6, as duly delegated by the Administrator of the EPA and the Regional Administrator, EPA, Region 6.

4. Respondent is Aktive Health, LLC, a company formed in the state of Texas and conducting business in the state of Texas.

Statutory and Regulatory Background

5. Congress enacted FIFRA, 7 U.S.C. 136 et. seq., in 1947 and amended it in 1972 and in 1996. The general purpose of FIFRA is to provide the basis for regulation, sale, distribution and use of pesticides in the United States.

6. Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), states that it shall be unlawful for any person to distribute or sell any pesticide that is not registered under Section 3 of FIFRA, 7 U.S.C. § 136a, or whose registration has been cancelled or suspended.

7. Pursuant to the regulation at 40 C.F.R. § 152.15, in relevant part, no person may distribute or sell any pesticide product that is not registered under the Act, except as provided in 40 C.F.R. §§ 152.20, 152.25, and 152.30. A pesticide is any substance (or mixture of substances) intended for a pesticidal purpose, i.e., use for the purpose of preventing, destroying, repelling, or mitigating any pest or use as a plant regulator, defoliant, or desiccant. A substance is considered to be intended for a pesticidal purpose, and thus to be a pesticide requiring registration, if the person who distributes or sells the substance claims, states, or implies (by labeling or otherwise) that the substance (either by itself or in combination with any other substance) can or should be used as a pesticide.

8. Section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a)(1), authorizes a civil penalty of not more than \$5,000 for each offense. The Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, as amended, and the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, 28 U.S.C. § 2461, and implementing regulations at 40 C.F.R. Part 19, increased these statutory maximum penalties to \$20,528 for violations that occur after November 2, 2015, and for which penalties are assessed on or after January 13, 2020.

Definitions

9. Section 2(s) of FIFRA, 7 U.S.C. § 136(s), defines “person” to mean any individual, partnership, association, corporation, or any organized group of persons whether incorporated or not.

10. Section 2(u) of FIFRA, 7 U.S.C. § 136(u), defines “pesticide” to mean any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest.

11. Section 2(t) of FIFRA, 7 U.S.C. § 136(t), defines “pest” to mean (1) any insect, rodent, nematode, fungus, weed, or (2) any other form of terrestrial or aquatic plant or animal life or virus, bacteria, or other micro-organism (except viruses, bacteria, or other micro-organism on or in living man or other living animals) which the Administrator declares to be a pest under Section 25(c)(1).

12. Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg), defines “to distribute or sell” to mean to distribute, sell, offer for sale, hold for distribution, hold for sale, hold for shipment, ship, deliver for shipment, release for shipment, or receive and (having so received) deliver or offer to deliver.

EPA Findings of Fact and Conclusions of Law

13. Respondent is, and at all times referred to herein was, a “person” as defined by Section 2(s) of FIFRA, 7 U.S.C. § 136(s).

14. On or about December 2020, the EPA conducted an investigation of Respondent’s compliance with FIFRA and the federal regulations promulgated thereunder (the “Investigation”). As part of the Investigation, the EPA requested, and Respondent provided documentation and information concerning Respondent’s distribution of pesticidal products.

15. Beginning on or about June 1, 2020, Respondent distributed or sold, as those terms are defined by Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg), the following products:

- a. Aktive Disinfectant Wipes; and
- b. Aktive General Disinfecting & Cleaning Wet Wipes

(the Products).

16. Labeling for Aktive Disinfectant Wipes states that the product “KILLS UP TO 99.9% OF GERMS.”

17. Germs are a “pest” as that term is defined by Section 2(t) of FIFRA, 7 U.S.C. § 136(t).

18. Labeling for Aktive General Disinfecting & Cleaning Wet Wipes states that the product “KILLS UP TO 99.9% OF VIRUSES & BACTERIA”.

19. Viruses and bacteria are “pests” as that term is defined by Section 2(t) of FIFRA, 7 U.S.C. § 136(t).

20. The Products are “pesticides” as that term is defined by Section 2(u) of FIFRA, 7 U.S.C. § 136(u), because they are substances intended for preventing, destroying, repelling, or mitigating pests.

21. The Products are “pesticides” as that term is further defined 40 C.F.R. § 152.15, which require registration pursuant to Section 3 of FIFRA, 7 U.S.C. § 136a, because they are substances intended for pesticidal purposes for which Respondent stated by labeling when distributing and selling the Products that the Products can or should be used as a pesticide.

22. At the time the Products were distributed or sold by Respondent, the Products were not registered pursuant to Section 3 of FIFRA, 7 U.S.C. § 136a.

23. On December 13, 2020, the EPA sent Respondent a Notice of Potential Violation and Opportunity to Confer letter. On December 30, 2020, the EPA responded to the documentation and information received from Respondent as a result of the opportunity to confer and articulated the EPA’s position concerning Respondent’s compliance with FIFRA.

EPA Findings of Violation

24. The facts stated in the EPA Findings of Fact and Conclusions of Law above are herein incorporated.

25. Complainant hereby states and alleges that Respondent has violated FIFRA and federal regulations promulgated thereunder as follows:

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26. At the time that Respondent distributed the Products, Respondent claimed, stated or implied (by labeling or otherwise) that the Products could or should be used as a pesticide; requiring registration of the Products under Section 3 of FIFRA, 7 U.S.C. § 136a and pursuant to the regulation at 40 C.F.R. § 152.15.

27. At the time that Respondent distributed the Products, the Products were not registered under Section 3 of FIFRA, 7 U.S.C. § 136a.

28. Respondent distributed the unregistered products on one hundred forty-four occasions.

29. Each distribution or sale of the Products, when not registered under Section 3 of FIFRA, 7 U.S.C. § 136a, was a violation of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A).

CONSENT AGREEMENT

30. For the purpose of this proceeding, as required by 40 C.F.R. § 22.18(b)(2), Respondent:

- a. admits the jurisdictional allegations set forth herein;
- b. neither admits nor denies the specific factual allegations stated herein;
- c. consents to the assessment of a civil penalty, as stated herein;
- d. consents to the issuance of any specified compliance or corrective action order;
- e. consents to any conditions specified herein;
- f. consents to any stated Permit Action;
- g. waives any right to contest the allegations set forth herein; and
- h. waives its right to appeal the Final Order accompanying this Consent Agreement.

31. Respondent consents to the issuance of this Consent Agreement and Final Order and consent for the purposes of settlement to the payment of the civil penalty specified herein.

32. Respondent and EPA agree to conciliate this matter without the necessity of a formal hearing and to bear their respective costs and attorneys' fees.

Penalty Payment

33. Respondent agrees that, in settlement of the claims alleged herein, Respondent shall pay a civil penalty of fifty-one thousand eight hundred fifty-six dollars (\$51,856.00), as set forth below.

34. Respondent shall pay the penalty within thirty (30) days of receiving notice of the effective date of the Final Order. Such payment shall identify Respondent by name and docket number and shall be by certified or cashier's check made payable to the "United States Treasury" and sent to:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
PO Box 979077
St. Louis, Missouri 63197-9000

or by alternate payment method described at <http://www.epa.gov/financial/makepayment>.

35. A copy of the check or other information confirming payment shall simultaneously be sent to the following:

Lorena S. Vaughn
Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 6
vaughn.lorena@epa.gov; and

Blake Sieminski
Enforcement and Compliance Assurance Division
Waste Enforcement Branch
U.S. Environmental Protection Agency, Region 6
sieminski.blake@epa.gov

36. Respondent understands that its failure to timely pay any portion of the civil penalty may result in the commencement of a civil action in Federal District Court to recover the full remaining balance, along with penalties and accumulated interest. In such case, interest shall

begin to accrue on a civil or stipulated penalty from the date of delinquency until such civil or stipulated penalty and any accrued interest are paid in full. 31 C.F.R. § 901.9(b)(1). Interest will be assessed at a rate of the United States Treasury Tax and loan rates in accordance with 31 U.S.C. § 3717. Additionally, a charge will be assessed to cover the costs of debt collection including processing and handling costs, and a non-payment penalty charge of six percent (6%) per year compounded annually will be assessed on any portion of the debt which remains delinquent more than ninety (90) days after payment is due. 31 U.S.C. § 3717(e)(2).

Effect of Settlement and Reservation of Rights

37. Full payment of the penalty proposed in this Consent Agreement shall only resolve Respondent's liability for federal civil penalties for the violations alleged herein. Complainant reserves the right to take any enforcement action with respect to any other violations of the FIFRA or any other applicable law.

38. The effect of settlement described in the immediately preceding paragraph is conditioned upon the accuracy of Respondent's representations to the EPA, as memorialized in the paragraph directly below.

39. Respondent certifies by the signing of this Consent Agreement that it is presently in compliance with all requirements of FIFRA and its implementing regulations.

40. Full payment of the penalty proposed in this Consent Agreement shall not in any case affect the right of the Agency or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law. This Consent Agreement and Final Order does not waive, extinguish or otherwise affect Respondent's obligation to comply with all applicable provisions of the FIFRA and regulations promulgated thereunder.

41. Complainant reserves the right to enforce the terms and conditions of this Consent Agreement and Final Order.

General Provisions

42. By signing this Consent Agreement, the undersigned representative of Respondent certifies that he or she is fully authorized to execute and enter into the terms and conditions of this Consent Agreement and has the legal capacity to bind the party it represents to this Consent Agreement.

43. This Consent Agreement shall not dispose of the proceeding without a final order from the Regional Judicial Officer or Regional Administrator ratifying the terms of this Consent Agreement. This Consent Agreement and Final Order shall be effective upon the filing of the Final Order by the Regional Hearing Clerk for EPA, Region 6. Unless otherwise stated, all time periods stated herein shall be calculated in calendar days from such date.

44. The penalty specified herein shall represent civil penalties assessed by EPA and shall not be deductible for purposes of Federal, State and local taxes.

45. This Consent Agreement and Final Order shall apply to and be binding upon Respondent and Respondent's agents, successors and/or assigns. Respondent shall ensure that all contractors, employees, consultants, firms, or other persons or entities acting for Respondent with respect to matters included herein comply with the terms of this Consent Agreement and Final Order.

46. The EPA and Respondent agree to the use of electronic signatures for this matter pursuant to 40 C.F.R. § 22.6. The EPA and Respondent further agree to electronic service of this Consent Agreement and Final Order by email to the following:

To EPA: *pittman.lawrence@epa.gov*

To Respondent: *cclare@clarkhill.com*; and *plarkin@clarkill.com*

RESPONDENT:
AKTIVE HEALTH, LLC

Date: _____

Signature

Name

Title

COMPLAINANT:
U.S. ENVIRONMENTAL PROTECTION AGENCY

Date: _____

Cheryl T. Seager
Director
Enforcement
and Compliance Assurance Division
U.S. EPA, Region 6

FINAL ORDER

Pursuant to Section 14(a) of FIFRA, 7 U.S.C. § 136l(a), and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. Part 22, the foregoing Consent Agreement resolving this matter is hereby ratified and incorporated by reference into this Final Order.

Respondent is ORDERED to comply with all of the terms of the Consent Agreement. In accordance with 40 C.F.R. § 22.31(b), the effective date of the foregoing Consent Agreement and this Final Order is the date on which this Final Order is filed with the Regional Hearing Clerk.

This Final Order shall resolve only those causes of action alleged in the Consent Agreement. Nothing in this Final Order shall be construed to waive, extinguish, or otherwise affect Respondents' (or its officers, agents, servants, employees, successors, or assigns) obligation to comply with all applicable federal, state, and local statutes and regulations, including the regulations that were the subject of this action.

IT IS SO ORDERED.

Thomas Rucki
Regional Judicial Officer

Date

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Consent Agreement and Final Order was delivered to the Regional Hearing Clerk, U.S. EPA, Region 6, 1201 Elm Street, Dallas, Texas 75270-2102, and that a true and correct copy was sent this day in the following manner to the addressees:

Copy via Email to Complainant:

pittman.lawrence@epa.gov

Copy via Email to Respondent:

Christopher B. Clare
Clark Hill PLC
cclare@clarkhill.com; and

Patrick J. Larkin
Clark Hill PLC
plarkin@clarkhill.com

Signed
Office of Regional Counsel
U.S. EPA, Region 6